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In The

Supreme Court of the United States

October Term, 1975

No.

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Petitioner,

vs.

BARRY WARREN KIBBE

Petition of the Monroe County, New York, District Attorney as Amicus Curiae for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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To the Honorable Justices of the Supreme Court of the United States:

The *amicus curiae* asks this Court to grant a writ of certiorari and review the judgment of the United States Court of Appeals for the second circuit in *Barry Warren Kibbe vs. Robert J. Henderson*, which was decided and judgment entered on April 8, 1976.

Opinions and Orders Below

The judgment of the Court of Appeals granting the writ of *habeas corpus*, the order denying rehearing, the order denying rehearing *en banc* and the decision and order of the District Court for the Northern District of New York are not reported, and are appended to the petition of the Attorney General of New York, counsel for petitioner. The decision of the New York Court of Appeals is reported in 35 N. Y. 2d 407, and the decision of the intermediate state appellate court is reported in 41 A.D. 2d 228, each sub nom *People vs. Kibbe.*

Jurisdiction

This Court has jurisdiction pursuant to Title 28 U.S.C. §1254 (1). The Court of Appeals judgment reversing the District Court for the Western District of New York was entered April 8, 1976. The petition for rehearing and rehearing en banc were each denied by the Court of Appeals on May 21, 1976.

Questions Presented

1: May the sufficiency of a charge to the jury in a state criminal prosecution be reviewed in isolation by a federal court to determine if the defendant was accorded due process?

2: May a defendant who does not object to the charge to the jury and who does not raise the issue on appeal nevertheless attack its sufficiency in federal *habeas corpus?*

3: Where a state jury in a criminal case is presented with each element of the offenses alleged, is a federal due process issue raised on grounds the charge was not detailed enough?

Statement of The Case

The facts are set out in detail in the petition of the Attorney General of New York. We include this, somewhat shorter version, for continuity and clarity.

Barry Kibbe and his co-defendant picked up their victim, Stafford, in a bar and offered to drive him home after they had seen him flash a roll of over two hundred dollars. He was concededly drunk when the trip to his house commenced. They soon turned down a remote county road, robbed him, and left him on the side of the road.

It was a cold winter night, temperature about 4 degrees farenheit. It had snowed, but the roadway had been plowed, and the excess snow formed snowbanks along the sides of the road. A few minutes later, a motorist, returning home, saw Stafford sitting in the roadway. The motorist couldn't react, and struck him. Stafford died that night in the hospital.

It later developed that Stafford's eyeglasses, his coat and his shoes had been removed by defendants and not returned when he was ejected from the car.

Defendants were indicted under New York Penal Law §125.25 (as effective in 1971), which makes it murder when:

> "***2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of a death to another person and thereby causes the death of another person; ***"

There was no objection to the judge's charge at the conclusion of the case, and the issue of causation was not raised on direct appeal to the state's intermediate appellate court (appellate division of supreme court). The conviction was affirmed, but one judge dissented on grounds the charge did not define or explain causation. The Court of Appeals affirmed unanimously, but said the charge could have been more detailed.

Kibbe's subsequent habeas corpus petition was denied by the district court for the western district of New York. On appeal, the second circuit court of appeals reversed, and granted the writ (one judge dissenting).

Reasons For Granting The Writ

In reversing the district court and granting the writ, the court of appeals majority necessarily found that the charge was deficient, and that the deficiency rose to Constitutional dimensions.

If review is granted, we will show that this decision conflicts with earlier decisions of this Court, as well as decisions of other court of appeals, including the second circuit.

Briefly, the second circuit majority based its decision on two theories: that the charge to the jury was sufficiently deficient so as to prevent the jury from declining all the necessary issues, and that defendant by failing to object to the charge had not deliberately by-passed the state's procedures, thereby preserving the issue for correction by *habeas corpus*.

We respectfully disagree with each of these conclusions, because they are a sharp departure from prior decisional law, and in addition, may add a serious burden to local prosecutors.

A. The By-Pass Issue

In *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, this Court pointed out that federal habeas corpus jurisdiction is not affected by procedural defaults occurring during the state court proceedings (discussion at 372 U.S. 438, 83 S. Ct. 848). The Court then said (372 U.S. at 439, 83 S. Ct. at 849):

> "*** If a habeas applicant, after consulting with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state court refused to entertain his federal claim on the merits ***."

Following this rationale, the court of appeals decided that defendant's failure to object to the charge was not a deliberate by-pass because the entire thrust of the defense was that the defendants had not caused the victim's death, but that the death resulted from the intervening acts of the motorist that actually struck the victim Stafford (slip opinion at 3087).

The thrust of *Fay* was that the federal courts should not be bound by state procedural rules which deprived a defendant of the right to test a Constitutional claim, if those rules were merely technical (see *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564).

The state requirement that a defendant make a timely objection of the charge so that corrective action, if necessary, can be taken is not merely technical. The state has a great interest in orderly court proceedings. Furthermore, the court of appeal's opinion notwithstanding, the state courts did consider the sufficiency of the charge. *People v. Kibbe*, 41 A.D. 2d at 230, and the dissent in that court at page 230.

In addition, the court of appeal's interpretation of the acts of the defense (slip opinion at 3087) do not square with the fact that the defense never raised the sufficiency issue in their appeal to the intermediate appellate court.

On review, we will show the Court that the by-pass theory is not applicable to the facts of this case. We will also show that this ruling will add an additional burden to every local prosecutor: we will now be required to examine every judge's charge for sufficiency without relying on defense counsel to make any objections or requests, since no objections from them will be required if their theory of the defense is clear from the

case. This will make our advocate's role very difficult. It could also encourage lackadaisical defense work.

B. The Sufficiency Of The Charge

The sufficiency of the jury charge was in issue in *Kenion v. Gill*, 155 F. 2d 176 (D.C. Cir., 1946), where the court said (at page 178):

> "*** Mere errors in the charge however, do not constitute sufficient basis for grant of habeas corpus. The inadequacy prerequsite to that writ must consist of the omission of essentials to such an extent that the accused is denied a fair trial in the Constitutional sense. ***"

Recently, in *Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396 (1973) this Court noted that a jury instruction cannot be viewed in isolation, but must be examined in light of the entire charge as well as the rest of the case (discussion 414 U.S. at 146, 147, 94 S. Ct. at 400).

In the present case, the opinion is apparently in conflict with the holdings above. The accused was not denied a fair trial in the state court per the *Kenion* holding, since it is clear from the entire charge, as well as the opening remarks and summations of the parties what the issues were. Furthermore, in order to find a due process violation in the charge, the court below had to view the omission in isolation, in conflict with the holding in *Cupp*.

The holding below is also in conflict with an earlier holding of that court.

In *U.S. ex rel. Smith v. Montayne*, 505 F. 2d 1355 (2nd Cir., 1974) one of the issues was the jury charge on intoxication and its effect on the question of intent.

In disposing of that issue, the court said at page 1359:

> " *** Whether or not the jury charge under consideration here is reversible as a matter of state law, the

> alleged errors are not of constitutional dimension. Defendant received a full and fair hearing and the trial judge's charge did not deprive defendant of his fundamental right to due process of law. It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court. *** "

This Court should accept this case for review to settle the question of what the local prosecutor's responsibilities are respecting the sufficiency of the jury instruction.

Respectfully submitted,

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